IN THE

Supreme Court of the United States

October Term, 1959.

No. ~~695~~ 36

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees.

On Appeal From the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 et seq.

JURISDICTIONAL STATEMENT.

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No.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, DEFENDANT AND GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, SUBSTITUTED ADDITIONAL DEFENDANT,

Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. § 2281 *et seq.*

JURISDICTIONAL STATEMENT.

A.

Opinions Delivered in the Court Below.

The majority opinion of the three-judge court, filed on December 1, 1959 but not yet reported, is annexed hereto as Appendix A, *infra*. Appendix A also contains Senior District Judge Welsh's dissenting opinion beginning on

p. 16a, *et seq., infra.* On December 7, 1959 the three-judge court denied a timely petition for rehearing, but simultaneously filed supplemental findings of fact which are annexed hereto as Appendix B, *infra*, p. 20a, *et seq.*

An appeal to the Court of Appeals for the Third Circuit, solely with respect to the claim of discriminatory enforcement was filed and was dismissed for lack of jurisdiction on December 9, 1959. An opinion thereon was filed on December 23, 1959, a copy of which is annexed hereto as Appendix C, *infra*, p. 23a. Appellant is simultaneously herewith filing a petition for a writ of certiorari to review said dismissal.

An appeal to the Court of Appeals for the Third Circuit on an earlier phase of this case is reported at 266 F. 2d 427 (C. A. 3rd, 1959).

B.

Statement of the Grounds on Which Jurisdiction Is Invoked.

The final order from which appeal is taken is from the decision of the three-judge court entered on December 7, 1959, on which day rehearing was also denied. See Appendix D. The notice of appeal was filed December 18, 1959 in the District Court.

The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1253, 1291 and 2281 *et seq.*, the appeal being from a final order of a three-judge court which refused a permanent injunction and dissolved the temporary injunction on the ground that the state statutes attacked by appellant did not conflict with the Federal Constitution. *Query v. United States*, 316 U. S. 486, 490-91 (1942); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, No. 13,096 (C. A. 3rd, December 23, 1959) (Appendix C); see also *Lee v. Roseberry*, 200 F. 2d 155, 156 (C. A. 6th, 1952); *cf. Radio Corp. of America v. United States*, 341 U. S. 412 (1951).

C.

Statutes Involved.

The Pennsylvania statutes whose validity are involved are the basic Pennsylvania Sunday law which provides:

"Whoever does or performs **any worldly employment** or business whatsoever on the **Lord's Day, commonly called Sunday** (works of necessity and charity only excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.

"Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment for the use of sojourners, travellers or strangers, or to hinder waterman from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families on the **Lord's Day**, commonly called Sunday, nor to the delivery of milk or the necessaries of life, **before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day.**" Act of April 22, 1794, 3 Sm. L. 177, § 1, 18 **Purd. Stat.** § 4699.4 (bold face type supplied),

and the Amendatory Act of August 10, 1959 which provides:

"**Whoever** engages on **Sunday** in the business of selling, **or sells or offers for sale, on such day at retail,** clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hard-

ware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding **two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.**

"Each separate sale or offer to sell shall constitute a separate offense . . ." P. L. No. 212, 18 **Purd. Stat.** § 4699.10. (bold face type supplied)

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States including the equal protection and due process clauses of the latter Amendment.

D.

Questions Presented

The basic Pennsylvania Sunday Blue Law, the Act of April 22, 1794, 18 **Purd. Stat.** § 4699.4, prohibits all "worldly employment" except acts of necessity on the "Lord's Day (commonly called Sunday)" so that the citizens of Pennsylvania can "read the Scriptures" and attend "religious worship." *Sparhawk v. The Union Passenger Railway Co.*, 54 Pa. 401, 408-09, 423 (1867); *Commonwealth ex rel. v. American Baseball Club of Philadelphia*, 290 Pa. 136, 143 (1927). This Act was amended on August 10, 1959 so as to impose additional and heavier penalties on those who sold or offered to sell at retail certain enumerated merchandise on the Lord's Day. The court below made the following findings of fact:

(1) the Amendatory Act of August 10, 1959 was to force the cessation of work on Sunday in order to commemorate weekly the sectarian religious event and doctrine of the Resurrection of Jesus Christ, the same event and doctrine as are commemorated by the Christian Easter (4a, 20a);

(2) that such practice was offensive to those persons whose religious teachings were contrary to those which gave such religious significance to Sunday, including Seventh Day Adventists, Seventh Day Baptists, Jews and atheists (4a);

(3) that work on Sunday had no different effect on the health or welfare of appellant's employees or customers from work on any other day (20a);

(4) Pennsylvania has a separate and distinct pattern of economic laws regulating hours of work which operate completely independently of the Sunday Laws (22a);

(5) by legislative acts and court decisions many substantially similar activities are exempt from the Sunday Blue Law (20a), and

(6) many activities substantially similar to those engaged in by the appellant have been and will be permitted by law enforcement officers in Pennsylvania even though nominally prohibited by statutes and court decisions (44a).

The record also shows that for personal profit reasons appellee, District Attorney Paul A. McGinley, wilfully and discriminatorily enforced the law only against appellant and not against other similar businesses even though such discrimination was called to his attention and protested. The court below refrained from making requested findings on the issue of discrimination in administration on the ground that McGinley's term of office would shortly expire, but many prosecutions instituted by him still are pending.

The questions therefore presented are:

1. Does the Pennsylvania Act of August 10, 1959, in the light of the court findings referred to above, violate the Fourteenth Amendment to the Federal Constitution because:

(a) it is a law respecting the establishment of religion;

(b) it discriminates against certain religions and prefers one religion over other religious beliefs;

(c) there is no reasonable basis for the classification of prohibited and permitted activities contained in the Pennsylvania Act of August 10, 1959 and other Pennsylvania statutes and court decisions dealing with worldly activities in Pennsylvania on the Lord's Day;

(d) it imposes oppressive and discriminatory fines?

2. Did the wilful, arbitrary and discriminatory enforcement of the Pennsylvania Sunday Blue Law against appellant by appellee, District Attorney Paul A. McGinley, deprive appellant of rights guaranteed it by the Fourteenth Amendment to the Federal Constitution?

3. Did the court below err in refusing to pass upon the constitutionality of the Act of April 22, 1794, 18 **Purd. Stat.** § 4699.4, and dismissing that part of the complaint on the ground that a subsequent Pennsylvania court decision might make said statute inapplicable to appellant's employees, despite the fact that (a) there was a state court decision that said Act did apply to appellant's employees and (b) appellant sold many items not covered by the Act of August 10, 1959 but covered by the Act of April 22, 1794?

E.

Statement of the Case.

This appeal is from the final order of a three-judge court for the Eastern District of Pennsylvania which denied a permanent injunction and dissolved the Temporary Injunction, after upholding by a two to one vote the constitutionality of the Pennsylvania Sunday Blue Laws, including the Amendatory Act of August 10, 1959, P. L. 212, 18 **Purd. Stat.** § 4699.10.

Said court was convened pursuant to Sections 2281, *et seq.* of Title 28 U. S. C.

The court below expressly held that its decision was "contrary to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959)," p. 10a, *infra*, which case is now on direct appeal to this Court at Docket No. 532, October Term, 1959.

Appellant herein, Two Guys from Harrison-Allentown, Inc., operates a retail store in Whitehall Township, Lehigh County, Pennsylvania, employing 300 persons. The store is along the highway outside the City of Allentown, with a parking lot for several thousand cars and caters to the family shopping group out for a Sunday drive and interested in economy as against "fancy and expensive downtown store" services.

Appellant opened its store in Lehigh County at a cost of over $1,000,000 only after it had been told that no one ever had been prosecuted for selling on Sunday and being assured by the township officials that its operation was permissible (N. T. 91, 96-97).[1] After appellant was open for six months the appellee, Paul A. McGinley, then the District Attorney of Lehigh County, began to arrest appellant's employees for violations of the Act of April 22, 1794, 18 **Purd. Stat.** § 4699.4, the basic Pennsylvania Sunday Blue Law. These arrests and prosecutions continued every

1. The "N. T." references are to notes of testimony taken in the court below.

Sunday although other business activities were permitted by appellee McGinley without arrest.[2] A year later, in November, 1958, said appellee threatened to arrest appellant's employees for conspiracy, the penalty for which is a two year jail sentence and a $500 fine. 18 **Purd. Stat.** § 4302.

The appellant thereupon brought a bill in equity in the Federal Court for the Eastern District of Pennsylvania pursuant to 28 U. S. C. §§ 1331 and 1343, 42 U. S. C. §§ 1981 and 1983 and to 28 U. S. C. §§ 2281 and 2284. The bill in equity alleged that the Pennsylvania Sunday Law—the Act of April 22, 1794—was unconstitutional because: (a) it was a law respecting the establishment of religion; or (b) a law which prefers or places at an advantage one religion over others; (c) it denies equal protection since it was discriminatory; and (d) the appellee, Paul A. McGinley, was applying the law to appellant in a wilfully discriminatory manner. On complaint and affidavits the Court issued a temporary restraining order.

Since appellant was making an attack on the constitutionality of a state statute the matter was heard before a specially constituted three-judge court. See *Two Guys from Harrison-Allentown, Inc. v. Paul A. McGinley*, 266 F. 2d 427 (C. A. 3rd, 1959).

Immediately prior to the time for trial and after the filing of the Complaint, the Pennsylvania Legislature passed an amendatory act—the Act of August 10, 1959—which singled out for more severe penalty certain retail sales of particular merchandise sold by the appellant. The bill in equity was amended to include an attack on the constitutionality of this Act on the same grounds.

The court after hearing granted a preliminary injunction against enforcement of the Sunday Blue Laws against appellant after finding that "substantial and irreparable in-

2. The Record shows that appellee, Paul A. McGinley, discriminated against plaintiff's employees because he was improperly induced to do so by Max Hess, the President and owner of Hess' Department Store, appellant's principal business competitor (N. T. 178-79, 239a-41, 195, 254-55).

jury will be suffered by plaintiff [if the statutes are applied to it] because plaintiff will be required to discontinue the operation of its store on Sunday, the day of its largest sales volume." (Order dated September 11, 1959.)

The case was tried on the merits in October, 1959. The court found that appellee, Paul A. McGinley, had threatened to enforce the Act of August 10, 1959, P. L. 212, 18 **Purd. Stat.** § 4699.10, against appellant's employees, that he had in the past enforced the Act of April 22, 1794, 18 **Purd. Stat.** § 4699.4, against appellant's employees, that appellant had no adequate remedy at law and that appellant would "suffer irreparable harm." See Appendix A, *infra*, p. 2a and Appendix B, *infra*, p. 22a.

Certain findings also are relevant to the merits of the question of the constitutionality of the Act of August 10, 1959.

The court below found that the origin, purpose and effect of the Pennsylvania Sunday Laws, including the Act of August 10, 1959, were to force observation of the Christian Lord's Day and that there were many persons in Pennsylvania who were offended in their religious beliefs by the required cessation of business on Sunday since it is "an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ." Appendix A, *infra*, p. 4a.

The Court also made the following additional findings of fact:

"1. Sunday is a day designated for religious services and observances of Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

"2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the em-

ployees or customers of the store than does work on any other day.

"3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of worldly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of July 2, 1935, P. L. 599, 4 *Purd. Stat.* §§ 59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of April 25, 1933, P. L. 74, 4 *Purd. Stat.* §§ 81-77; to stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 *Purd. Stat.* §§ 121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 *Purd. Stat.* §§ 151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 *Purd. Stat.* §§ 181-185, provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, § 1, as amended, 30 *Purd. Stat.* § 265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, § 702, as amended, 34 *Purd. Stat.* § 1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, § 406, as amended, 47 *Purd. Stat.* § 4-406 (pp. 71-72).

"4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 *Purd. Stat.* § 4651, 4 *Purd. Stat.* § 82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 *Purd. Stat.* §§ 152, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the first Sunday and $200 thereafter, 4 *Purd Stat.* § 4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner it is $100 for each sale at retail, but only $4.00 at wholesale. Sale of slip covers for automobile seats all day Sunday entails a $4.00 fine; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter, and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

"5. The Commonwealth of Pennsylvania, has enacted a pattern of economic laws under the police power regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 *Purd. Stat.* § 103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, § 4, as amended, 43 *Purd. Stat.* § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 *Purd. Stat.* § 361 (bakery workers

cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 *Purd. Stat.* § 481 (employees of motion picture theaters must be given one day of rest per week)." Appendix B, *infra*, pp. 20a-22a.

The majority of the court, however, refused to declare the two Pennsylvania statutes under attack unconstitutional. With respect to the Act of August 10, 1959, it held that despite the clear proof of the religious origin, purpose and effect thereof, this Court's action in *Friedman v. New York*, 341 U. S. 907 (1951), wherein this Court dismissed an appeal with respect to a New York Sunday statute for "want of a substantial federal question," precluded an independent consideration of the constitutionality of such statute, since that decision had to be construed as a holding that any Sunday Blue Law even though religious in origin, purpose and effect, nevertheless does not violate the Fourteenth Amendment. With respect to the argument on the equal protection clause due to the unreasonable and discriminatory classification contained in the 1959 Act, the court, ignoring religious overtones of the statute, held that where the statute deals with economic matters this Court permits "even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations." Appendix A, *infra*, p. 12a.

The court below refrained from passing upon the claim that the appellee District Attorney, Paul A. McGinley, had wilfully and discriminatorily enforced Sunday Laws against the appellant. It conceded and found as a fact that there had been no enforcement prior to actions against the appellant. But it held that it would not make "an anticipatory finding" with respect to the future because the term of Paul A. McGinley as District Attorney would expire, according to the Court, on December 31, 1959. But it did admit that on the present record even after appellee's term

would end "we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities." Appendix A, *infra*, p. 14a.

It disposed of the constitutional problem thus presented, however, by the novel theory that any discrimination that could be carried out by the Legislature through a statute would be equally valid if carried out by the individual law enforcement officer by applying the statute against only certain businesses regardless of the motive for the discrimination on the part of the official. Appendix A, *infra*, p. 14a.

On the theory that a Pennsylvania court might hold that activities covered by the Act of August 10, 1959 were now exempt from the broader provisions of the Act of 1794, it refused to pass upon the constitutionality of the Act of 1794. It did this despite the fact that less than a year before the highest Pennsylvania court had held that appellant's employees *were* covered by the Act of 1794, *Commonwealth v. Bauder*, 188 Pa. Super. Ct. 424, 145 A. 2d 915 (1958), *allocatur refused*, 188 Pa. Super. Ct. xxviii, and appellee himself was still contending that he could arrest under the Act of 1794 (Appendix A, *infra*, p. 3a), and appellant sold many items covered only by the Act of 1794.

As stated above, the court entered a final order denying the prayer for final relief and dissolving the temporary restraining order previously in effect. On rehearing, the court, *inter alia*, refused to retain jurisdiction of the part of the case dealing with the Act of 1794 pending a state court determination.

Appellant attempted to appeal to the Court of Appeals solely from the part of the court's order that dealt with the question of discriminatory enforcement by appellee, Paul A. McGinley, but the Court of Appeals held that an appeal from any action of a three-judge court would have to be to this Court, even with respect to the part of the case which could have been heard originally by a single judge.

This Court on December 11, 1959, refused to reinstate the restraining order pending the Appeal.

After the expiration of the term of office of Paul A. McGinley, an order was entered permitting appellant to substitute George J. Joseph, the new District Attorney, as an additional defendant.

F.

The Federal Questions Are Substantial, Were Wrongly Decided Below, and Are of Great Public Importance.

I.

This is the first case where a court has made an explicit finding of fact that a particular state law complained of is religious in origin, purpose and effect and yet sustained the statute against a claim of unconstitutionality.[3] Such a result clearly conflicts with the decisions of this Court holding the First Amendment to the Federal Constitution is made applicable to states by the Fourteenth Amendment. See *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1948), which set up the test of prohibited state action in the religious field as follows:

> "Neither a state nor the federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.

3. Recognized scholars from Blackstone to Chief Judge Magruder have recognized the religious nature and effect of Sunday Blue Laws. IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (9th Ed. 1783), Chapter 4, pp. 63-64; MARK, THE FAITH OF OUR FATHERS, p. 286; FISHER, HISTORY OF THE INSTITUTION OF THE SABBATH DAY, pp. 63-66; III STOKES, CHURCH AND STATE IN THE UNITED STATES, pp. 154-56, 157-58, 168-69; see also plaintiff's Brief in the court below, copies of which were filed with this Court on December 9, 1959 in support of its petition for an interim restraining order.

> No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

The decision in the case at bar also conflicts with the decision of the three-judge court of the District of Massachusetts which held unconstitutional the Massachusetts Sunday Law. *Crown Kosher Super Market of Massachusetts v. Gallagher*, 176 F. Supp. 466 (D. Mass., 1959), now on appeal to this Court at Docket No. 532, October Term, 1959. In that case the court said:

> "What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group.
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> * * *
>
> "For reasons closely related to those just set forth, the objection is well taken that, in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of liberty, without due process of law, contrary to the Fourteenth Amendment." p. 475.

Also, Judges Goodrich and Hastie in *Bargaintown, U.S.A., Inc. v. Whitman*, United States District Court for the Middle District of Pennsylvania, Civil Action No. 6760,

a case dealing with the Pennsylvania Act of August 10, 1959, said:

> "If the question involved in this case came to us as one of first impression we would find great difficulty in upholding the constitutionality of the legislation in question."

Judge Hastie was also one of the majority below in this case.

Such doubt as to constitutionality certainly is not disposed of by a simple reference to this Court's single line order in *Friedman v. New York*, 341 U. S. 907 (1951).

The compulsory abstention from work on Sunday is a compulsory form of religious observance, like kneeling, covering or uncovering the head and other ceremonies or symbols. As this Court said in the flag salute case, *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 632-33, 642 (1943):

> "There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one

man's comfort and inspiration is another's jest and scorn."

* * *

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

The findings of the court below with respect to a separate statutory scheme for hours of work and the effect of Sunday work on the employees and customers, as well as Chief Judge Magruder's clear analysis of the day-of-rest argument in the *Crown Kosher* case, *supra* make it crystal clear that the question of Sunday Laws must be squarely met and disposed of by this Court. In *Friedman v. New York, supra*, there was no finding by the court below that the statute involved was religious in nature, purpose or effect. The same thing is true of the other Sunday law cases which this Court has refused to hear since 1950.

It would seem, in accordance with the procedure followed in *Brown v. Board of Education*, 394 U. S. 483 (1954), that this new finding of fact requires a reconsideration of the *Friedman* rule, just as the new finding of fact by the lower court in the *Brown* case required a reconsideration of the separate-but-equal doctrine. More basic in fact is that *Friedman, supra* is not here controlling. *Crown Kosher v. Gallagher, supra*.

The last full opinion by this Court on Sunday laws was in 1896 (*Hennington v. Georgia*, 163 U. S. 299, 304), the same year as *Plessey v. Ferguson*, 163 U. S. 537, and was a half century prior to the decision in *Murdock v. Pennsylvania*, 319 U. S. 105 (1943), which for the first time held that the religious protections of the First Amendment apply to state action, under the Fourteenth Amendment.

II.

As set out in findings of facts Nos. 3 and 4 of the court below, Appendix B, *infra*, pp. 20a-21a, the business and commercial activities permitted on Sunday and the varying fines for those prohibited afford no rational basis for distinction between those prohibited and those subject to stringent penalty. And the penalties are in some cases 200 times the amount collected on the sale.

In what manner does a sale at retail differ from a sale at wholesale justifying different Sunday treatment? If these are day-of-rest statutes, do not employees of wholesale establishments, factories and service establishments need a day of rest too? What is the distinction between commodities not listed in the Act of August 10, 1959 as against those contained therein?

Certainly such willy-nilly statutory distinctions do not comply with the constitutional requirement that "a statutory discrimination must be based on differences that are reasonably related to the **purpose of the Act** in which it is found." *Morey v. Doud*, 354 U. S. 457, 465 (1957); *Smith v. Cahoon*, 283 U. S. 553, 567 (1931); see also *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 406 (1928), wherein this Court said:

> ". . . classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situ-

ated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

If it be argued that the reason for the classifications and exemptions in the present Pennsylvania Sunday statutes is to keep pace with changing mores of proper deportment on Sunday, to permit those recreational activities which modern religion tolerates and to ban or condemn commercial and business activities which it disapproves of, —the so-called "continental Sunday"—such legislation would be seeking to achieve an unconstitutional purpose, namely to establish religion, albeit a more relaxed type of religion than the Puritan principles which the original Sunday laws were enacted to serve. It would be unconstitutional because of this end purpose. No other tenable or rational basis for the classification and discriminatory exemptions can be advanced.

Many State cases faced with statutory classification schemes less discriminatory than the Pennsylvania situation have held their Sunday laws unconstitutional as denial of equal protection of laws. See *e.g.*, *City of Mt. Vernon v. Julian*, 369 Ill. 447, 17 N. E. 2d 52 (1938); *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N. W. 2d 643 (1951); *Gronlund v. Salt Lake City*, 194 P. 2d 464 (Utah, 1948); *Allen v. Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1938); *Gaetano Bocci & Sons Co. v. Town of Lawndale*, 208 Calif. 720, 284 Pac. 654 (1930); *Deese v. City of Lodi*, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937); *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939 (1943); *Ex parte Hodges*, 65 Okla. Crim. 69, 83 P. 2d 201 (1938); *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952).

Once again the First Circuit's decision in *Crown Kosher Super Market of Massachusetts v. Gallagher*, 176 F. Supp. 466 (D. Mass., 1959), is directly opposite that of the decision in the case at bar. Moreover, even if the law were economic rather than religious, this Court has never held that merely because a law is economic in purpose a Legislature can engage in "whimsical classifications." In fact, this Court has repeatedly held that even with respect to economic legislation the classification must be reasonable and be based upon a difference between those activities included and those excluded. *Morey v. Doud*, 354 U. S. 457 (1957).

Appellant is engaged in a new type of merchandising which the public is very much in favor of. Obviously the existing downtown stores are using every method to throttle this unwelcome competition. As Senior Judge Welsh observed in his dissent, the downtown department stores seek to stifle the competition by reviving the religious laws which had fallen into disuse (18a-19a). Since this law affects the economic life of a large segment of a particular industry certainly this matter should be resolved by this Court.

III.

The decision of the court below affects adversely all those who do not believe in the resurrection of Christ on Sunday, including Jews, who are 3.04% of the population and Seventh Day Adventists and Baptists who are 1% of the population. It also affects adversely the 4% of the population that has no religious traditional affiliation or belief. The decision unfortunately represents the type of judicial approach to Sunday Law questions so ably described by Judge Voelker in *People's Appliance & Furniture, Inc. v. City of Flint*, Supreme Court of Michigan, Nov. 24, 1959, 99 N. W. 2d 522, 530 (1959):

> ". . . there exists a curious and rather widespread judicial reticence when our courts are dealing

with so-called Sunday ordinances. The judicial approach then often seems to become gingerly to the point of timidity, as though the fact that, however invalid such ordinances may be when judged by ordinary standards, after all most Sunday ordinances are plainly on the side of morality and all right-thinking people and, if they should err, they do so on the side of the angels. If such a tendency exists (and we trust we are wrong), we can only observe that an unreasonably discriminatory or otherwise invalid ordinance is no less bad because it happens also to please the pious. It is bad enough that Sunday ordinances should ever unreasonably discriminate between our people; it is doubly bad should there ever be any hint of judicial discrimination in their interpretation as against the accepted rules of interpretation applying to ordinary ordinances. Yet this apparent double standard is particularly evident in Michigan, as I shall presently undertake to demonstrate. One had not heretofore been sufficiently aware of the fact that in Michigan there are evidently Sunday standards for judging Sunday ordinances. I am now aware and I do not like what I see."

IV.

The court's decision, unless reversed, will establish the rule of law that wilful and purposeful discrimination in the enforcement of a statute by a state officer only violates the Fourteenth Amendment if the victim can show that the classification which results from the officials' wrongful actions is one which the state Legislature could not have brought about. This obviously is not the law. It would be a complete abandonment of the fundamental concept that ours is a government of law, not of men. Such a rule, moreover, is in conflict with the decisions of this Court: *Mackay Telegraph & Cable Co. v. Little Rock*, 250 U. S. 94, 100

(1919); *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23 (1931). There is a difference—a constitutional difference—between a classification made by a Legislature and one made by a law enforcement officer, particularly where he makes the discrimination for improper motives. *Yick Wo v. Hopkins*, 118 U. S. 356, 374 (1886); *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352 (1918).

V.

The refusal to pass upon the Act of 1794 raises a serious question of appropriate Federal procedure. Here the state court had less than a year before held that the Act of 1794 applied to appellant's employees and the appellee conceded that said Act still applied. Appendix A, *infra*, p. 3a. Moreover, appellant sells many items not covered by the Act of 1959 but covered by the broad language ("all worldly employment") of the Act of 1794. See *Chicago v. Atchison T. & S. F. R. Co.*, 357 U. S. 77 (1958); *Public Utilities Commission v. United States*, 355 U. S. 534 (1958); *County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185 (1959), particularly with respect to whether jurisdiction should have been maintained pending a state court determination and what protective relief by way of an injunction or a stipulation by a responsible state officer of no enforcement pending decision appellant was entitled to in the interim. *Cf. Doud v. Hodge*, 350 U. S. 485 (1956); *Harrison v. NAACP*, 360 U. S. 167, 178-79 (1959).

VI.

The questions presented by the instant case and by the decision of the court below are substantial and important. Since the decision was by a specially constituted three-judge court it would seem that appellant has a statutory right to

present its views and argument before this Court. *Query v. United States*, 316 U. S. 486, 490-91 (1942); *cf. Radio Corp. of America v. United States*, 341 U. S. 412 (1951). Moreover, the decision is not an isolated decision of an inferior court which, though in error, does not present that recurring type of situation which this Court will review. Since 1950 there have been repeated petitions to this Court seeking a final determination on the constitutionality of the Sunday laws of various states. *Cf. International Brotherhood of Teamsters, A. F. L. v. Vogt, Inc.*, 354 U. S. 284 (1957). In addition, this is a recurring problem presently before the Supreme Courts of many states as well as lower federal courts. See *e.g. Bargaintown, U. S. A., Inc. v. Whitman*, U. S. D. Ct. for the Middle District of Pennsylvania, Civil Action No. 6760; *Braunfeld v. Gibbons*, U. S. D. Ct. for the Eastern District of Pennsylvania, Civil Action No. 26,945; *McGowan v. Maryland*, 151 A. 2d 156 (Md., 1959), *appeal docketed in this Court* at October Term, 1959, No. 438; *Sarner v. Township of Union*, Superior Ct. of N. J., Law Revision, Docket No. L-13061-57 P. W. (May 7, 1959).

Since the problem is fundamental, touching on a controversial religious question, the legal controversy will be resolved only by a determinative decision of this Court after full argument aided by comprehensive briefs on the merits.

CONCLUSION.

The Pennsylvania Sunday Laws here in question were found by the court below to be religious in purpose and effect. It is apparent that the court refrained from invalidating them only because of the order of this Court in the *Friedman* case, which, if it be a decision on the merits, was predicated upon an entirely different fact finding. The arbitrary classifications and exemptions in these laws could be sustained in no context other than a religious one. Appendix A, 19a.

The questions herein presented are substantial and of great public and immediate importance. Appellants request that jurisdiction be noted and this case be set for argument at the same time as No. 532, October Term, 1959.

Respectfully submitted,

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Dated: February 11, 1960.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 25626.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Plaintiff,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,
Defendant.

Before: HASTIE, *Circuit Judge;* WELSH, *Senior District Judge;* and LORD, *District Judge.*

OPINION.

[Filed December 1, 1959]

By HASTIE, *Circuit Judge.*

This case has been tried to a statutory three-judge court constituted as provided in Sections 2281 and 2284 of Title 28, United States Code. The plaintiff, Two Guys From Harrison-Allentown, Inc., seeks an injunction to prevent the District Attorney of Lehigh County from enforcing against its employees, and thus against its retail selling business, the criminal sanctions of the Pennsylvania Sunday closing laws, sometimes called the Sunday "blue laws". Continuously since 1957 plaintiff has operated a large department store, employing some 300 persons, in a suburban

area near the City of Allentown in Lehigh County. This store opens for business on Sunday as well as on the other six days of the week. About one-third of its business is done on Sunday.

The pleadings allege and the evidence establishes as a fact that, prior to a 1959 amendment of the "blue laws", the defendant had undertaken to enforce against the plaintiff's business and its employees the general provision of the Act of June 24, 1939, P. L. 872, § 699.4, 18 P. S. § 4699.4 that "whoever does or performs any wordly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted) . . . shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars . . . ." It is also alleged and appears as a fact that the defendant is now threatening to enforce against the plaintiff's business and employees Section 699.10 as added to the Sunday closing law by the Act of August 10, 1959, P. L. 212, 18 P. S. § 4699.10, which reads as follows:

> "Whoever engages on Sunday in the business of selling, or sells, or offers for sale on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business, or office furnishings, household, business, or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall upon conviction thereof in a summary proceeding for the first offense be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> "Each separate sale or offer to sell shall constitute a separate offense . . . ."

The evidence does not show and the court does not find any present or continuing threat to enforce against plaintiff's retail selling the above quoted provision of the 1939 statute, although the defendant has expressed the legal view that both the old Section 699.4 and the new Section 699.10 apply to the situation of the plaintiff.

In these circumstances a question arises at the outset which affects the scope of proper present inquiry. Since the 1959 amendment has made the retail sale of specific categories of merchandise on Sunday a wrong punishable by a fine of one hundred dollars, does the sale of such merchandise continue to be punishable by a fine of four dollars under the older general prohibition of "worldly employment or business or Sunday"?

The 1959 enactment says nothing about the earlier general prohibition although it was enacted as an amendatory addition to Section 699 of the Penal Code in which the earlier prohibition appears. We think it can reasonably be argued that the new section supersedes the older one insofar as the latter covered in generality activities now specifically dealt with and more severly punished in the amendatory enactment. *Cf. Commonwealth v. Brown*, 1943, 346 Pa. 192, 29 A. 2d 793; *Commonwealth v. Gross*, 1941, 145 Pa. Sup. 92, 21 A. 2d 238. In any event, here is a substantial unsettled question concerning the construction of the questioned state legislation. When the Pennsylvania courts decide this question they may well resolve it by an interpretation which will relieve the plaintiff and those associated with it of any punitive action under the 1939 statute.

In such a situation it is our duty to refrain from passing upon the constitutionality of the 1939 statute until the state courts have made clear whether it applies at all to the plaintiff since the 1959 amendment. *Harrison v. N. A. A. C. P.*, 1959, 360 U. S. 167; *Spector Motor Service v. McLaughlin*, 1944, 323 U. S. 101; *Railroad Commission v. Pullman Co.*, 1941, 312 U. S. 496. Even if the statute were clear, a court of the United States should, as a matter of

policy to minimize interference with state action, refuse gratuitously to pass on the constitutionality of a provision of a state law when the plaintiff cannot show present urgent need for federal intervention to prevent actual or imminently threatened deprivation of constitutional right. Plaintiff is in no such jeopardy now under the 1939 statute. In these circumstances we think it inappropriate to pass upon the constitutionality of the 1939 statute at this time or even, as was done in the cases cited above, to hold the case *sub judice* pending an interpretative state ruling. It is enough to say that our disposition of the present case shall not bar future resort to this court by the plaintiff if and when the state courts shall authoritatively decide that the 1939 statute still applies to selling which is covered by the 1959 amendment, and if and when plaintiff's business shall be jeopardized by a present threat of prosecution under the 1939 statute. The present adjudication will concern the 1959 amendment only.

Plaintiff attacks the Pennsylvania legislation commanding the cessation of certain worldly activity on Sunday as state action promoting "an establishment of religion" contrary to the prohibition of the First Amendment, as made applicable to the states by the Fourteenth Amendment. The argument is that this required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ. There is testimony which establishes as a fact in this record that this view of the religious significance of enforced Sunday work stoppage is sincerely held by many persons whose religion not does not recognize the divinity or resurrection of Jesus of Nazareth or the sacredness of Sunday as the "Lord's day".

At the outset we consider a contention that this First Amendment argument has been foreclosed by authoritative determinations of the constitutionality of Sunday laws es-

sentially similar to the Pennsylvania statute. At the turn of the century, before the Supreme Court had ruled that the First Amendment guarantees are enforceable through the Fourteenth Amendment against the states,[1] Sunday "blue laws" were upheld in two familiar decisions of the Court. *Hennington v. Georgia*, 1896, 163 U. S. 299; *Petit v. Minnesota*, 1900, 177 U. S. 164.[2] If these stood alone their present authority would be questionable in the light of the development of constitutional concepts during this century. But more recently a new test of the constitutionality of Sunday legislation was sought in an appeal to the Supreme Court from a conviction under the New York Sunday laws. *Friedman v. New York*, 1951, 341 U. S. 907. In the jurisdictional statement filed in the Supreme Court in support of that appeal the appellant said: "The question to be resolved is an important one: Are *Hennington v. Georgia* and *Petit v. Minnesota* still law in view of the *Everson* and *McCollum* decisions"? Accordingly, it is appropriate that we examine that case carefully.

The defendants in the *Friedman* case, who were Orthodox Jews, had been convicted of the retail selling of kosher meat on Sunday in violation of the New York prohibition against "all manner of public selling [except for many miscellaneous exemptions] . . . upon Sunday . . . . ." 39 N. Y. Consol. Laws, McKinney, 1944, § 2147. The defense was carefully planned and organized under the direction of Leo Pfeffer, Esquire, a distinguished advocate and legal writer who had specialized in the field of religious

1. The ruling as to freedom of religion was first made in 1940 in *Cantwell v. Connecticut*, 310 U. S. 296, 303, although first foreshadowed fifteen years earlier. *Gitlow v. New York*, 1925, 268 U. S. 652.

2. See also the earlier dictum in *Soon Hing v. Crowley*, 1885, 113 U. S. 703, 710: "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

liberty.[3] Before the Supreme Court the appellant's very explicit statement of "Questions Presented" read in part as follows:

> "1. Whether the New York Sabbath Law (Article 192 of the New York Penal Law) is a law respecting an establishment of religion and is, therefore, invalid in its entirety under the First Amendment to the United States Constitution which is made applicable to the States by the Fourteenth Amendment.
>
> "2. Whether the New York Sabbath Law is constitutionally invalid as violative of the freedom of religion provision of the United States Constitution, because it fails to exempt from its operations persons whose religious convictions compel them to observe a day other than Sunday as their holy day of rest.
>
> "3. Whether the New York Sabbath Law by reason of its 'crazy quilt' pattern of inclusions and exclusions is arbitrary and discriminatory and therefore violative of the 'equal protection of the law' and 'due process' provisions of the United States Constitution."

Of course these points were appropriately elaborated. Moreover, they had been raised at trial and had been considered and decided against the defendants by the highest court of New York. *People v. Friedman*, 1950, 302 N. Y. 75, 96 N. E. 2d 184. Indeed, Mr. Pfeffer points out in his book, and his submission must have made it plain to the Supreme Court, that this was essentially a test case to determine the vitality of the doctrine of the *Hennington* and *Petit* cases in the light of contemporary understanding of the reach of the First and Fourteenth Amendments. There can be no question but that the Supreme Court was plainly urged to find in the New York law the very consti-

3. Pfeffer's CHURCH, STATE, AND FREEDOM, 1953, discusses Sunday laws in general and the *Friedman* case in detail at pages 227-241.

tutional infirmities we are now asked to find in the Pennsylvania law. Yet, without permitting oral argument the Court disposed of the case in a per curiam opinion dismissing the appeal and saying merely: "The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question." 341 U. S. 907. In these circumstances the *Friedman* case seems to mean that in the Supreme Court's view such legislation as the New York law is so clearly invulnerable to First and Fourteenth Amendment attack that it would not even be useful to permit further argument of the matter.[4]

In effect, the Court was content to leave as the law of the land its old reasoning that "the legislature having . . . power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say

4. As early as 1902 the Supreme Court recognized the stare decisis effect of its per curiam disposition of cases properly appealed to it. *Fidelity & Deposit Co. v. United States*, 1902, 187 U. S. 315, 349. In more recent times this point has become important in the administration of the Court's rules and procedure which require that an appeal of right from a state court be supported by a jurisdictional statement, stating "the reasons why the questions presented are so substantial as to require plenary consideration . . . ." Rule 15, par. 1(e), 346 U. S. 962. If that showing is insufficient or unpersuasive a per curiam dismissal for want of a substantial federal question or a summary affirmance of the judgment below follows. Unless such a dismissal is grounded in some procedural or technical insufficiency of appellant's presentation, its meaning seems to be that the disposition of the federal question by the state court was clearly right. In essence, such a per curiam is likely to be a particularly emphatic ruling on the merits of the question. The Court itself has explicitly recognized such summary rulings as authoritative precedents. *Baskin v. Industrial Accident Commission*, 1949, 338 U. S. 854; *North Coast Transportation Co. v. United States*, 1944, 323 U. S. 668. See also the statement of Mr. Justice Brennan, concurring in *Eason v. Price*, 1959, 360 U. S. 246, 247, that, "votes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ."

that the wrong day was fixed. . . ." See *Hennington v. Georgia, supra,* at 304.

As an inferior court asked to hold unconstitutional the Pennsylvania laws prohibiting certain Sunday retail selling, we can escape from the obligation to apply the ruling in the *Friedman* case only if the Pennsylvania law is so significantly different from the New York law that a different result can be reached and justified without departing from the legal view for which the *Friedman* case stands.

It has been suggested that the New York law differs significantly from the Pennsylvania law in two respects. First, the aim to protect the Christian Sabbath from profanation is said to be much plainer in Pennsylvania than in New York. In this connection, the text of the laws, their history and their judicial interpretation all are relevant. The basic Sunday "blue laws" of Pennsylvania, New York and many other states today are derived from colonial and early state statutes which, in turn, had been derived from British laws designed to require observance and to prevent profanation of the Christian Sabbath. A hundred years before the American revolution an English statute prohibited any person from engaging in "worldly labor or business or work of the ordinary calling on the Lord's Day, works of necessity and charity excepted". 1676, 29 Car. II, C. 7. The colonial theocracies, among them both New York and Pennsylvania, adopted markedly similar legislation which they reenacted after they became states of the United States of America.[5] The basic Pensylvania statute as it has come down to us in Section 699.4 of the codification of 1939, with its prohibition of "worldly employment or business . . . . on the Lord's Day", has already been set out. The New York statute, 39 N. Y. Consol. Laws, McKinney, 1944, § 2140 begins with this declaration:

5. See the summary of the evolution of legislation against "Sabbath breaking" in New York from colonial times in the dissenting opinion of Judge McCarthy in *Crown Kosher Super Market v. Gallagher,* D. Mass., 1959, 176 F. Supp. 466, 477, 484.

> "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

Pursuant to this declaration the statute prohibits, among other things, "all manner of public selling" except for miscellaneous exemptions. § 2147. We thing it cannot be seriously questioned that in their relation to the first day Sabbath as an institution of Christianity the New York and Pennsylvania statutes have a common background and were in original conception designed to the same end. Moreover, the involvement of religious considerations appears clearly on the face of the basic statute in both states.

Local judicial interpretation of the two statutes tells the same story. In the case of *People v. Dunford*, 1912, 207 N. Y. 17, 20, 100 N. E. 433, the Court of Appeals declared:

> "That the legislature has the authority to enact laws regulating the observance of the Sabbath day and to prevent its desecration is not, and cannot well be, disputed. The day is set apart by the statute for repose and for religious observance; objects which pertain to the physical and moral well being of the community. As to the acts which should be prohibited, as disturbances, or profanations, of the Sabbath day, the legislature is the sole judge."

Similarly in *People v. Moses*, 1893, 140 N. Y. 214, 215, this language appears:

> "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being of the people, and the peace, quiet and good order of society, has authority to regulate its observance, and prevent its desecration by any appropriate legislation is unquestioned."

See also *People v. Zimmerman*, 1905, 95 N. Y. S. 136. Finally, in the *Friedman* case itself, the opinion of the New York Court of Appeals, which was submitted to the Supreme Court for review, explicitly recognized the religious origin of the New York statute. 302 N. Y. at 79, 96 N. E. 2d at 186.

We find nothing in the cases discussing the Pennsylvania legislation and its background which makes any plainer the religious considerations which underlie the adoption of the "blue laws" of that state and from time to time have been utilized to justify them. The historical religious connection is so clear in both state statutes as to be obvious and indisputable. It has been stressed that the Supreme Court of Pennsylvania in upholding the local statute had gone so far as to say that "Christianity is part of the common law of Pennsylvania". *Commonwealth v. American Baseball Club of Philadelphia*, 1927, 290 Pa. 136, 138 Atl. 497, 499. But a New York case, *People v. Ruggles*, 1811, 8 Johns 290, went just as far.

Thus, the Supreme Court in the *Friedman* case was faced with very substantial indicia of the statute's relation to religion, strikingly similar to those appellant urges upon us now. We can see no basis for reasoning that the Pennsylvania statute is unconstitutionally related to an establishment of religion without bringing the New York statute under the same interdiction. Yet, the Supreme Court sustained the New York statute summarily. If the view of the establishment of religion question thus authoritatively established by the Supreme Court is to be changed it is for that Court, not an inferior court, to do so. Our conclusion that the *Friedman* case has broad and controlling significance on the issue of establishment of religion is contrary to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market v. Gallagher*, D. Mass. 1959, 176 F. Supp. 466. That opinion disposes of this problem of controlling authority in a brief footnote which is not elaborate enough to make the court's

reasoning clear to us. It affords no useful critique of our own analysis which indicates that the *Friedman* precedent is controlling.

As a separate point the plaintiff urges that the 1959 amendment is a denial of equal protection of the laws in that it unreasonably singles out certain types of retail selling for mandatory Sunday closing under heavy penalty—a hundred dollar fine, and twice that on subsequent offenses—while many other kinds of commercial activity are either permitted on Sunday or, if prohibited, subjected only to a very small fine, in most cases only four dollars.

This line of argument against Sunday closing statutes, no less than the First Amendment argument, has a considerable history of Supreme Court adjudication. Indeed, essentially the same argument was made against another provision of the Pennsylvania "blue laws" in *Commonwealth v. Grochowiak*, 1957, 184 Pa. Super. 522, 136 A. 2d 145. The Pennsylvania courts considered and rejected any argument that closing Sunday movies under a fifty dollar penalty while other worldly amusements and activities were permitted, or at least prohibited under the much smaller four dollar penalty, was arbitary and unreasonable and a denial of equal protection of the laws. The case was taken to the Supreme Court where the appeal was dismissed for failure to present a substantial federal question. 358 U. S. 47. In *State v. Towery*, 1954, 239 N. C. 274, 79 S. E. 2d 513; appeal dismissed 347 U. S. 925, a Sunday seller of general merchandise complained that a North Carolina law prevented him from operating on Sunday yet allowed drug stores to remain open and to sell the same kinds of merchandise. The North Caroline courts sustained the statute and the Supreme Court dismissed the appeal. Similar summary dismissal has been the fate of other recent claims of arbitrary classification and unreasonable discrimination in the selection of certain businesses and activities for Sunday closing while others, said to be no less objectionable, remained unmolested. *State v. Kidd*, 1957, 167 Ohio St. 521, 150 N. E. 2d 413, appeal dismissed 358 U. S. 132;

Gundaker Central Motors v. Gassert, 1956, 23 N. J. 71, 127 A. 2d 566, appeal dismissed 354 U. S. 933; *State v. McGee*, 1953, 237 N. C. 633, 75 S. E. 2d 783, appeal dismissed 346 U. S. 802. This point was also involved in the *Friedman* case, which has already been discussed in relation to the establishment of religion issue. Indeed, the Fourteenth Amendment argument of arbitrary classification seems to have been made as strongly there as was the First Amendment argument. See Pfeffer, CHURCH, STATE, AND FREEDOM, *supra*, 230-234, 239-240. The New York statute was attacked as a miscellany of pointless, irrational and discriminatory differentations in the treatment of various Sunday commercial activities. But the Supreme Court was not persuaded that the contention had sufficient merit even to require full argument.

In larger context, cases arising under the Sunday closing laws are but a striking example of the continuing reluctance of the Supreme Court to interfere with even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations. *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 1955, 348 U. S. 483; *Kotch v. Board of River Port Pilot Commissioners*, 1947, 330 U. S. 552; *Tigner v. Texas*, 1940, 310 U. S. 141. But *cf. Morey v. Doud*, 1957, 354 U. S. 457. While *Morey v. Doud*, indicates that the Supreme Court will still strike down what it views as the most patently arbitrary of economic classifications we cannot ignore the fact that no Sunday law has seemed to the Court to raise even a substantial question in this area.

Moreover, in the case of the 1959 amendment of the Pennsylvania law, the circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action. In the present record it appears and we find that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that

of the plaintiff initiated and triggered new and rather large scale violations, and threats of others. It also appears in the testimony which is part of the legislative hearing on the bill which became the 1959 amendment of the Sunday closing law, that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute. It is probable that such considerations influenced the legislature's 1959 decision to make Sunday retail selling the subject of a new prohibitory enactment. In such circumstances we find it impossible to believe that the Supreme Court would treat this case as significantly different from those in which it has dismissed appeals for want of a substantial federal question.

Finally, it is argued that, because the general prohibition in the 1939 statute against worldly activity on Sunday has for a long time not been enforced strictly or at all against many worldly Sunday activities, it is a denial of equal protection of the law to enforce the new 1959 prohibition against the Sunday retail sale of specified kinds of merchandise. On this point the evidence is clear and we find as a fact that in Lehigh County numerous commercial and recreational activities covered by the general prohibition of the 1939 statute have long been conducted openly on Sunday, and continue, without molestation or direction to desist by the defendant or by any public officer. On the other hand, beginning in 1957 and thereafter the defendant made substantial and frequent efforts by admonition and arrest to compel the Sunday closing of numerous retail stores, including plaintiff's store. This court temporarily restrained the enforcement of the 1959 statute

against the plaintiff within a week after its enactment. Since that time enforcement of the "blue laws" in Lehigh County has been held in abeyance. In these circumstances, the court finds no sufficient basis for a finding as to the future pattern or procedure of enforcement of the new statute if and when judicial restraint shall be removed. The impracticability of such an anticipatory finding is made the more obvious by the fact, of which we take judicial notice, that the term of office of the defendant as District Attorney expires at the end of the calendar year 1959. Thus, on the present record we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities. Is this such a discrimination as denies equal protection of the laws?

It may well be a violation of public duty under state law for local public officers to ignore widespread violations of the 1939 law. But it does not follow that the enforcement of the 1959 statute denies the Sunday selling retailer due process of law. The controlling constitutional principle is that such selective or discriminatory behavior by administrative officers, though wrongful, is not a violation of the Constitution unless equivalent action by the state legislature would be unconstitutional. *Snowden v. Hughes*, 1943, 321 U. S. 1; *Owensboro Waterworks Co. v. Owensboro*, 1906, 200 U. S. 38. See also *Hayman v. Galveston*, 1927, 273 U. S. 414, 416. In the situation we now are considering the administrative failure to enforce the 1939 law against certain types of Sunday activity creates a constitutional problem only to the extent that a legislative exemption of these activities from Sunday closing would do so. But we already have pointed out that the Supreme Court has repeatedly treated the fact that a Sunday closing law is a hodgepodge characterized by many and seemingly pointless exceptions and exemptions as insufficient to raise a sub-

stantial federal question. A hodgepodge in enforcement has no greater constitutional significance.[6]

On the whole case, while the court has jurisdiction of the parties and of the subject matter under Sections 1343 and 2281 of Title 28 of the United States Code, the plaintiff has failed to show any violation of the First or the Fourteenth Amendment of the Constitution of the United States. Accordingly, plaintiff is not entitled to relief in this action.

The factual statements and legal conclusions stated in this opinion shall constitute the findings of fact and conclusions of law of the court. An order may be presented dissolving the temporary injunction heretofore entered in this case. A final order and decree may be presented denying plaintiff relief.

The foregoing opinion, which has been approved by Judge Lord, is to be filed, together with the separate opinion of Judge Welsh.

sgd. WILLIAM H. HASTIE,
Circuit Judge.

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6. In so ruling we in no way detract from the authority of the leading case of *Yick Wo v. Hopkins*, 1886, 118 U. S. 356, where the administrative discrimination practiced against Chinese entrepreneurs would have been no less invidious and constitutionally intolerable if directed by the legislature.

WELSH, *Senior District Judge*, concurring in part and dissenting in part.

It had been my hope after discussing this deep and fundamental problem with my Associates, to arrive at a completely unanimous conclusion. But a conscientious conception of Judicial duty, whether completely warranted or not, requires me to express myself in my own way on this subject.

Let me say at the outset that this Court, individually and collectively, has sought to catch the spirit as well as the letter of the various arguments of all concerned. We are all in agreement on the original legislation including that of the Act of 1939. On this religious phase of the subject I can speak from personal experience. Having been born in the late seventies and having lived in an environment and atmosphere of reverence for the Sabbath until I reached my early manhood, I know whereof I speak. That legislation was the outgrowth of deep feelings of all but a microscopic minority. The framers of the Law had gone through a religious experience and a spiritual Renaissance that clearly set before them the evils of excessive worldly pleasures and unbridled seeking and striving for worldly riches. Their principal objective was to minimize the weakening of the spiritual life by too much worldly pleasures. Labor was secondary at that time, secondary, because of the simple habits and custom of the times. Most people did their own labor. There were very few employers having control over large numbers of men. And nearly all labor, such as it was, could be suspended for a day without confusion or without inconvenience to the community.

For over a hundred and fifty years the initial legislation has been on the Statute books. Times and customs have changed, due to the different conditions under which we live. To me it seems almost an entirely different world. It is but natural that great changes should bring about a clamor for modification or repeal of those inhibitions.

An appeal for relief has been made to the Courts. Is that the proper Tribunal? After a Statute has been on the books for a hundred and fifty years or more should the Judicial Branch of the Government strike it down or should the appeal for relief be made to the Legislative Branch? Or to the people direct? Having served for many years in both the Judicial and Legislative Branches of the Government I cannot conceive that the Courts have power to make such a decision as we are asked to make in this case by the plaintiff. In expressing this conclusion I do not want to be understood as not recognizing the increased demand for a change. Sometimes the advocates of the change speak rather harshly of the framers of those laws without an understanding of the motives that prompted their enactment. Often those who resist the repeal of this legislation today, are not entirely unsympathetic with the proponents of repeal. They know that in many respects the law has been a dead letter for many years. But countless thousands of fair minded Americans who truly love God and their neighbor, look upon these laws as something pointing to a spiritual ideal—unrealized it is true—but still an expression of a desire of a great Country and a great people to attain and reach for something higher than the flesh-pots of Egypt or the corroding gold of a Midas.

During the last half century they have seen the struggle against materialism become more and more fierce. They are now seeing mighty nations rising against each other with weapons of annihilation and destruction greater than Satan himself could devise. At home and abroad they see the misery inflicted, and their hearts are troubled. They still feel safer with a declaration of principle expressing hope for an ideal still on the books of this beloved Country. And in this global struggle they just do not want to throw the life preservers overboard to lighten the ship.

That is the way I read the feeling of our people. I am moved to say this in the hope that if both groups can see

and feel what is on both sides of this question it will lead to a better understanding and a charitable goodwill on the part of all of us.

For these reasons I concur with the majority opinion in dismissing plaintiff's attack on all legislation prior to 1959.

In construing the Act of 1959 there are other considerations involved. It is frankly admitted by the sponsors of the Act that there is nothing of a religious character or element in the legislation. One can therefore fairly ask, why then should it be tacked on to an Act that was conceived and cradled in religiosity, if not in religion? The amending Act actually is one to regulate business and to deal with the competition among business men. Such far reaching effort to regulate the private lives of others should be bottomed on a firm Constitutional foundation, and the need, the necessity, and the evil to be controlled, fully met. We ask: Is it based on public health, public security, public morals, sanitation, water supply, education, or any of the factors that would, standing by themselves be admittedly a basis for the power of the legislature to enact.

I do not want to go over the ground so thoroughly covered by my Associates but I do not find that the legislation has met the test on any of these requirements. We all admit that under our form of Government there are things that the legislature cannot do. The fundamental rights of the people have never been at the unrestricted mercy of a possible unreasonable and arbitrary legislature. MOREY v. DOUD, 354 U. S. 457. And in determining whether or not the legislature has kept within the legitimate bounds it is proper for the Courts in construing legislative action to ask these very pertinent questions as stated above.

It is also the duty of the Court to take into consideration the various facts that mark the introduction of the legislation and the events leading up to such introduction. I do not think anyone will seriously argue that there is such a rising tide of spiritual interest in Sunday's observance

as to constitute a clamor for more stringent laws to insure the sanctity of the Christian Sabbath. The trend has been quite the reverse. Therefore, why this sudden eruption of Sabbath interest? All the facts leading up to the introduction of this Statute appear in the record and without desiring to be critical they are not particularly wholesome or praiseworthy. (This is no reflection on the County Officials.) High pressured salesmanship, outstanding organizing ability, a fantastic list of prohibited activity, indicate that a single target was the objective and a single purpose to regulate business competition. In addition it was enacted a few months before a highly important State election when members of the legislature from various parts of the State were put to undue and unreasonable pressure to vote for this legislation, that they would not think of supporting if it was not connected with the Sunday closing. The proponents of the legislation admit this was a helpful feature in getting it passed.

If it is conceded that this legislation is within the power of the legislature to enact, then I cannot conceive of any future legislation that cannot also be passed. We know that far-sighted men are considering the advisability of the four day working week, due to automation and the fear of unemployment. If this Act lies within the power of the legislature to enact, it will be establishing a precedent for drastic curtailment of the right to work in the future.

It is not like the daylight saving legislation, couched in the language of a recommendation or request, but in the language of a command subject to drastic penalty for violation.

This view is entirely too far to the left for me to say that the legislative branch has any such power without a specific grant of authority from the people. I would strike it down.

Sgd. Geo. A. Welsh.

APPENDIX B.

SUPPLEMENTARY FINDINGS OF FACT.

[Filed Dec. 7, 1959]

Present: HASTIE, *Circuit Judge*, WELSH, *Senior District Judge* and LORD, *District Judge*.

Pursuant to the request of plaintiff the court makes the following findings of fact in addition to those already made and stated in the course of the opinion of the court:

1. Sunday is a day designated for religious services and observances by Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day.

3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of worldly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of July 2, 1935, P. L. 599, 4 *Purd. Stat.* §§ 59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of April 25, 1933, P. L. 74, 4 *Purd. Stat.* §§ 81-77; to stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department

of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 *Purd. Stat.* §§ 121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 *Purd. Stat.* §§ 151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 *Purd. Stat.* §§ 181-185, provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, § 1, as amended, 30 *Purd. Stat.* § 265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, § 702, as amended, 34 *Purd. Stat.* § 1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, § 406, as amended, 47 *Purd. Stat.* § 4-406 (pp. 71-72).

4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 *Purd. Stat.* § 4651, 4 *Purd. Stat.* § 82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 *Purd. Stat.* §§ 153, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the first Sunday and $200 thereafter, 4 *Purd. Stat.* § 4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner, it is $100 for each sale at retail, but only $4.00 at wholesale. Sale of slip covers for automobile seats all-day Sunday entails a $4.00 fine; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter, and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas

novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

5. The Commonwealth of Pennsylvania has enacted a pattern of economic laws under the police power regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 *Purd. Stat.* § 103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, § 4, as amended, 43 *Purd. Stat.* § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 *Purd. Stat.* § 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 *Purd. Stat.* § 481 (employees of motion picture theaters must be given one day of rest per week).

6. The enforcement of the Sunday laws against plaintiff's employees, as threatened by defendant, will cause them not to work on Sundays. This will require plaintiff to close its store on Sunday, which is likely to render its entire operation unprofitable.

7. Unless enjoined, defendant will enforce the 1959 statute against plaintiff's employees, thereby causing plaintiff to suffer irreparable harm.

/s/ WILLIAM H. HASTIE,
Circuit Judge.

/s/ GEO. A. WELSH,
Senior District Judge.

/s/ JOHN W. LORD, JR.,
District Judge.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,096

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA.
PENNSYLVANIA RETAILERS' ASSOCIATION, AMICUS CURIAE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Heard on Petition for Temporary Restraining Order or Other Relief, December 9, 1959.

Before GOODRICH and STALEY, *Circuit Judges.*

OPINION OF THE COURT.

(Filed December 23, 1959)

PER CURIAM

The plaintiffs in this case have taken the position that they may appeal to the Supreme Court of the United States from an adverse decision by a three-judge court on the issue of the constitutionality of the statute and simultaneously appeal to the Court of Appeals on the issue of discriminatory enforcement of the statute. We think there is no basis for the allowance of a split appeal in this fashion. Therefore, we dismiss the appeal to this Court for want of jurisdiction. See 28 U.S.C.A. §§ 1253, 1291.

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 25626.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Plaintiff,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,
Defendant.

Present: HASTIE, *Circuit Judge;* WELSH, *Senior District Judge;* and LORD, *District Judge.*

FINAL ORDER.

And now, this 7th day of December, 1959, the above-captioned civil action having come before the court as provided in 28 U.S.C. Sections 2281 and 2284 and the court having filed its opinion and having determined that plaintiff is not entitled to any relief, it is hereby ordered, adjudged and decreed that plaintiff's prayer for a permanent injunction should be and hereby is denied and that plaintiff's complaint should be and hereby is dismissed.

/s/ WILLIAM H. HASTIE,
Circuit Judge.

/s/ JOHN W. LORD,
District Judge.

I dissent.

/s/ GEORGE A. WELSH,
Senior District Judge.